

Q&A: Bad Weather Office Closures

The Blizzard of 2013: Tips for Employers That Are Still Digging Out

Don't let power outages, icy road conditions and other winter nuisances undermine your compliance with federal wage, hour and leave laws.

Author: RITA ZEIDNER

Published: February 9, 2013 at 05:21:00 EST

Mother Nature is once again acting up, preventing many employers in the Northeast from conducting business as usual.

We asked Shlomo Katz (<http://www.brownrudnick.com/people-detail/katz-shlomo-d>), author of Thompson's Fair Labor Standards Act books, and Jonathan R. Mook (<http://www.dimuro.com/attorneys/mook/>), a federal leave and disability expert with DiMuro Ginsberg in Alexandria, Va., how federal wage and hour, leave and disability laws apply to office closures caused by power outages, unsafe road conditions and other winter-related nuisances. Portions of this piece first ran in various Thompson compliance publications in early 2012.

It's starting to snow and forecasters are calling for a blizzard. I want to close the office at 2 p.m., when most staff would have worked only a partial day. Must I pay employees for a full day?

SK: That depends on their FLSA status. For exempt employees, the answer is an unqualified "yes." An exempt employee's pay is not subject to reduction because of variations in quality or quantity of work performed. If the exempt employee is ready, willing and able to work, but was prevented by the employer's decision from doing so, you may not dock his pay (Wage-Hour Opinion Letter No. FLSA 2005-41, Oct. 24, 2005).

For non-exempt employees, the rules are different. Hourly non-exempt employees only have to be paid for actual working time, unless a contract requires otherwise. However, some non-exempt employees are salaried — for example, if you are using the fluctuating workweek method of overtime compensation. In that case, you must pay the salaried non-exempt employee for today.

For those workers who were out for the week on FMLA leave and thus didn't come in at all on a day we closed early, how many hours count towards FMLA leave if a full day is eight hours?

JM: The Department of Labor's FMLA regulations do not specifically deal with this circumstance. However, the regulations do provide that where a holiday occurs within the week taken as FMLA leave, the entire week is counted as a week of FMLA leave (29 C.F.R. §825.200(h)). Thus, in line with this rule, if you close the office early because of snow, the week still may be counted as a week of FMLA leave for those employees on leave who are taking leave in weekly increments. The only exception would occur if the employee is taking intermittent FMLA leave (i.e., in increments of less than one week) and the office is closed when the leave was to be taken. In this situation, the regulations indicate that only the amount of leave an employee actually takes may be counted against the employee's FMLA entitlement. According to the law, "when an employee takes leave on an intermittent or reduced leave schedule, only the leave actually taken may be counted toward the employee's leave entitlement" (29 C.F.R. §825.205(b)(1)). The same FMLA rules would apply to both exempt and non-exempt employees.

Can I require exempt employees to use their vacation or accrued leave when the office is closed because of bad weather?

SK: Arguably, yes. Since the FLSA does not require employers to provide vacation or paid-time-off, it is enough that you are paying the employee. It shouldn't matter what pool of money it comes from.

The city is totally unprepared for the shutdown. Roads are closed and I decide to keep the office closed for the next two days. All regularly scheduled workers will be paid. What about the workers who were already scheduled to be out on FMLA leave? Do they still get docked for FMLA leave?

JM: The answer is probably the same as when a holiday falls on a day when an employee is taking FMLA leave. However, if the snow storm forces the office to be closed for one or more weeks, there should be no docking of FMLA leave. The FMLA regulations provide that where the employer's business activity has temporarily ceased for one or more weeks, the days the employer's activities have ceased do not count toward the employee's FMLA leave entitlement (29 C.F.R. §825.200(h)).

The office will be closed for the full week because of bad weather. Must I still pay exempt employees?

SK: No. Department of Labor regulations make clear that: "Exempt employees need not be paid for any workweek in which they perform no work." Therefore, when a place of work is closed for a full week, whatever the reason, employees need not be paid for that week (Wage-Hour Opinion Letter, April 30, 1975).

An employee whose disability makes it impossible to drive is unable to catch a ride home in the snow storm. The employee wants to spend the night in a hotel. Who is responsible for the cost of a hotel room — the employer or the employee?

JM: The employee is responsible for the cost of a hotel room. Paying for a hotel room is not a reasonable accommodation. Of course, an employer can always voluntarily pick up the tab for a hotel room, and in this circumstance, it certainly would seem to be advisable if only in terms of employee morale. No employer wants to be considered an Ebenezer Scrooge.

An exempt employee performed work at home when the office was closed because of bad weather. Must I pay her for the full day?

SK: Yes.

What about a non-exempt employee who performed work at home when the office was closed? Must I pay him?

SK: Yes, for the hours actually worked.

After three days, the streets are mostly plowed. But an employee who uses a wheelchair is unable to get to work because the sidewalks are icy. What are my legal responsibilities to that employee under the following scenarios:

Scenario 1: The employee answers the phones and must be in the office to do the job; there is no way to have the phones switched over to her home. Must I pay her?

JM: The employer would not need to pay the disabled employee, although the employee could take leave (either paid or unpaid). Being in the office to answer the phones is an essential job function.

Scenario 2: The employee could, theoretically, do her job from home, but we don't encourage telecommuting. Am I still required to make the accommodation under these weather-related circumstances? I'm concerned that other employees will wonder why they can't also work at home.

JM: Under the ADA, reasonable accommodation may include work at home, particularly where the weather prevents a disabled employee from coming to work. The fact that other employees may complain is not a legitimate consideration.

In short, an employer has a reasonable accommodation obligation to consider alternative arrangements when bad weather prevents a disabled employee from getting to work. Work from home certainly should be considered since telecommuting has become very common these days.

The office is open today but an exempt employee can't make it in because of bad weather. May I dock him a day's pay?

SK: Yes, if he does no work at home. An employee who is absent due to inclement weather is absent for personal reasons and may be placed on leave without pay for the full day(s) he fails to report to work due to such circumstances as a heavy snow day (Wage-Hour Opinion Letter No. FLSA2005-41, Oct. 24, 2005).

The office was open today but an exempt employee couldn't make it in because of bad weather. Instead he worked at home for a few hours and spent the rest of the day making a snow man with his kids. Must I pay him for the full day?

SK: Yes. Work at home is also work. If exempt employees miss less than a full day of work because of snow or other adverse weather conditions, their salaries may not be docked.

I am planning ways to make sure that all my employees are taken care of in the event of a snowstorm. Am I permitted to ask my employees if anyone will need special accommodation? May I ask a specific employee who I believe might need accommodation — because she uses a wheelchair — what kind of accommodation she needs?

JM: After the terrorist attacks of Sept. 11, the EEOC issued a fact sheet on obtaining and using medical information as part of an employer's emergency evacuation procedures. According to the EEOC, an employer may periodically survey all of its current employees to determine whether they will require assistance in an emergency, as long as the employer makes it clear that self-identification is voluntary and explains the purpose for requesting the information. In addition, the EEOC has opined that an employer may ask employees with known disabilities if they will require assistance in the event of an emergency.

The EEOC, however, has not specifically addressed issues involving employees getting to work in bad weather. An employer's need for medical information in determining whether employees can get to work in the event of a snow storm, for example, is not as apparent as when there may be an emergency and the employer's facility needs to be evacuated.

Important first steps for any employer considering a weather closure policy include determining what operations must be continued, which employees are essential to continue those operations, and then to design a plan for ensuring that those employees will be able to get to work. Besides being disabled, there are countless factors that may keep an employee from getting to work during a snow storm. For starters, the employee may live in the mountains 30 miles away from the workplace. A savvy employer simply could ask essential employees whether they would have any problems getting to work without specifically focusing on medical conditions. The employer could then deal with the problems identified by the employees, regardless of whether a disability is involved.

I have asked an employee with a disability if she needs accommodation. She says she doesn't. Have I done my due diligence? In other words, am I off the hook? If not, what do I have to worry about?

JM: For now, you are off the hook. However, if a problem arises in the future and you believe that it may be due to the employee's disability, an employer should ask whether there is there anything the employer can do to help the employee perform the job. An employer's duty of reasonable accommodation is a continuing one and just because an employee may not need an accommodation at one point doesn't mean that worker doesn't need accommodation in the future.

* * * * *

More Thompson disaster and weather related resources (<http://hr.complianceexpert.com/news/weathering-the-storm-1.331331>)

Copyright 2012. Thompson Publishing Group.